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THE LAW OF THE TELEPHONE.

The telephone is the product of an age of remarkable inventions. It is still a new institution and while some legal questions concerning it are decided, others will depend upon the progress of electrical science for their final adjudication.

The "telephone" belongs to the genus "telegraph." Not only from the similarity of their electrical principles, but especially from their similar relations to the public, must the law class them together. In *Attorney General v. Edison Telegraph Co.*, 6 Q. B. Div. 244, it was held that a conversation through a telephone was a "message," or at all events "a communication transmitted by telegraph," and therefore a telegram within the meaning of the English Telegraph Acts. Indeed, the definition given by Morse of his electro-magnetic telegraph forms a perfect definition of the telephone. He called it "an instrument or apparatus which by means of wires conducting the electric fluid, conveys intelligence to any given distance with the velocity of lightning."¹

In short, while technically the telephone refers to an instrument which transmits the voice of the speaker,² it is so closely related to the telegraph that the statutes will, in the absence of special controlling conditions, extend the law of telegraphy to include telephones.³

From the nature of its service the telephone has assumed a position as public agent. As a time-saving factor in commerce it stands next to the telegraph. The initiation, progress and completion of business transactions involving immense interests, depends upon the certainty of telephonic communication.⁴ But where property has thus from the nature of its employment come to be of public consequence and affects the community at large, it ceases to be *juris privati* and becomes clothed with a public interest.⁵ Special privileges and special obligations follow as a result of such a legal status, and therefore from the nature of its public function we find the telephone affected by the rights and liabilities

¹ Webster's Dict., "Electro-magnetic telegraph."

² *Hockett v. State*, 105 Ind. 250.

³ *Bell Tel. Co. v. Com.*, 3 Atl. Rep. 825; 53 N. J. L. 341; 53 Ala. 211.

⁴ 17 Neb. 126.

⁵ *Munn v. Ill.*, 94 U. S. 113.

of a common carrier.⁶ Both the telegraph and the telephone, except where they are merely for private convenience, undertake for hire to carry news for any who choose to employ them. As the telegraph has undertaken with the public for the rapid transmission of despatches from its offices, so the telephone has undertaken to transmit oral messages from its instruments, one of which it proposes to supply to each party requiring it. Its chief right against the public is that of eminent domain,⁷ a right to which it, like the telegraph, is entitled only by reason of its character as a public use, and which it must exercise in deference to the highest public good.

Telegraph law holds for telephones on questions where their public status is identical,⁸ but the peculiar nature of telephone service has led to complications since the introduction of electric railways, owing to the disturbances due to induction, conduction and leakage.

Long before the introduction of steam and electricity it was held that the primary object of a street was for the free passage of the public,⁹ a rule that seems to be followed in the cases of the Central Pa. Telegraph Co. *v.* Wilkesbarre Ry. Co., 11 Pa. Co. Ct. Rep. 417, and R. R. Co. *v.* Teleph. Co., 27 N. E. Rep. 890. In the former it was held that a telephone company * * * must not interfere with the free use of the street * * * and this duty includes the precautions necessary to keep its wires from coming in contact with those of a street railway subsequently occupying the street. The second case dealt with the question of disturbance to telephone wires caused by conduction and leakage, where both companies used the ground to complete their circuit; and the Court said that the prior occupation of the street by virtue of a franchise from the city, did not give a telephone company the right to enjoin an electric-railway company from locating its poles and wires over the same street. Since both companies were lawfully using their franchises, and the difficulty could be avoided if either would abandon the ground circuit and use a return wire, the Court held that it was not a question of prior right of occupancy, and that the telephone company had acquired no vested right to the use of such ground circuit. The primary and dominant purpose of the street is for public passage, and any occupation except for travel or transportation is inferior to such public easement.

⁶ 47 Fed. Rep. 433; 17 Neb. 126; 118 Ind. 194; 61 Vt. 461; 105 Ind. 250; 66 Md. 399.

⁷ Am. and Eng. Encyl. Law, 25, p. 747.

⁸ Am. and Eng. Encyl. Law, 25, p. 746.

⁹ King *v.* Russell, 6 East, 427.

As between two public uses, the more important takes precedence, on the principal that the highest public good is the end of all law. Injunction was therefore denied to the telephone company in this and similar cases,¹⁰ and while further developments in electrical science may alter the present status of these electrical companies, their duty to sacrifice private interests to the common good must remain.

Rights and duties are correlative, and the telephone company, by accepting the benefits of the law extending to it the right of eminent domain, surrenders its system to the public, and binds itself to render equal service to all, under proper and reasonable regulations.¹¹ The duty of a common carrier as to impartiality is elementary law, having its foundation in public right, which is superior to every private right. To illustrate the length to which a court has gone to uphold this view, we may instance the case of *Cent. Union Telph. Co. v. State*, 118 Ind. 194, in which it was held that, where the statute regulates the monthly charges of telephone companies, even though a company has abandoned the rental system and adopted a public toll system, nevertheless any person within its district has the right to demand and receive private telephone facilities.

The most interesting phase of this subject arises where the telephone company holds patent rights of the government. Telephones in this country are largely monopolized by the Bell company, which holds the patent rights and leases them to local corporations; and, depending on the exclusive right of patentees to make, use and vend their productions as secured by Federal laws, they often attempt to boycott their rivals by stipulations in their contracts of license. The cases, with one exception,¹² hold such contracts void, and deny the right of the licensor to demand, or the licensee to accept such conditions. There is here at first sight, an apparent conflict of authority,—State laws abridging and restricting the monopoly secured to an inventor under the national patent laws; but in the words of an Ohio case,—“the use of property—arising from discovery—is not beyond the control of State legislation, simply because the patentee acquires a monopoly in his discovery.”¹³ While enjoying the monopoly conferred by his patent, he must exercise his rights therein, subject to the obli-

¹⁰ *Cumberland Tel. Co. v. United Electric R. Co.*, 42 Fed. Rep. 273; *Hudson River Telph. Co. v. Watervliet Turnpike Co.*, 121 N. Y. 397.

¹¹ 47 Fed. Rep. 433; 17 Neb. 126; 118 Ind. 194; 66 Md. 399.

¹² 49 Conn. 352. For views above see 47 Fed. Rep. 433; 17 Atl. Rep. 1071; 97 U. S. 508, 509; 36 O. St. 296.

¹³ 36 O. St. 296.

gations imposed by the common and statute law. "If he leases his product for a public rather than an individual use he thereby gives the use to the whole public."¹⁴ This power of the State to dictate rules to every sort of public business is discussed at length in *Munn v. Ill.*, 94 U. S. 113. In that case it is said that, "when one devotes his property to a use in which the public has an interest he must submit to be controlled by the public for the common good, to the extent of the interest he has thus created." He need not apply his property to a public employment, but if he does the employment will be subject to the rules prescribed by law, for it is the business as such and not the right to a patent monopoly that is regulated.¹⁵ The use of a patent can never be enforced against the will of a patentee, but the telephone patent is of little value except by being subjected to public use; and the owners cannot hope to reap the benefits of such a use and escape its obligations. The State, as we have seen, grants to the telephone company the right of eminent domain, the right which is never conferred on any but a public use; and the patent rights which it possesses exclusively and may continue to hold exclusively if it asks no State assistance, are waived, in so far as they are inconsistent with the new duties arising on the acceptance of such State privileges.¹⁶

Like all common carriers the telephone company may establish reasonable conditions which applicants must comply with; and the use of profane or obscene language over a telephone may justify a company in refusing further service, on the same ground that a telegraph is not liable for a failure to send immoral or gambling messages.¹⁷

The party discriminated against by a telephone company cannot bring an action at law, for there is no breach of contract; but his remedy lies in a writ of mandamus,¹⁸ a mode of relief that will avail even in the hands of a rival company, and which is not abridged by the imposition of statutory penalty.¹⁹

Finally, although State statutes have been referred to as enforcing these duties to the public, they are only declarative of the common law, by virtue of which the State police power has always controlled public employments.²⁰

¹⁴ 17 Atl. Rep. 1071.

¹⁵ *Munn v. Ill.*, 96 U. S. 113. *Teleph. Co. v. Delaware*, 2 C. C. A. 1.

¹⁶ 47 Fed. Rep. 433; 2 C. C. A. 1; 27 N. E. Rep. 890; *C. U. Tel. Co. v. State*, 123 Ind. 113; 118 Ind. 194; 66 Md. 399; 36 O. S. 296.

¹⁷ *Pugh v. City Tel. Co.*, 27 Alb. L. J. 163.

¹⁸ 17 Neb. 126; 66 Md. 399; also see cases under note 16, *supra*.

¹⁹ 118 Ind. 194. ²⁰ *Hockett v. State*, 105 Ind. 250; 17 Neb. 126.

The same basic principles that determine the duties of a telephone company to impartial service, also establish the right of the State to regulate charges. It springs directly from the State police power and is a common law right of regulating public employments, which our constitution has left to the various States. Though somewhat intangible and difficult to define, owing to its various phases, this power is inherent in every sovereignty and embraces the entire system of internal State regulations.²¹ "*Sic utere tuo ut alienum non laedas*" is its controlling principle; the legislature²² is its agent delegated to regulate the charges of public employments to the end of preventing any unjust discrimination, and if the legislature fails to do so, the court must decide on reasonable rates.²³ But such power of regulation is not a power to destroy—and does not do away with the right to make reasonable charges, a right which exists under the general law governing natural persons and not as a result of a special franchise or privilege.²⁴ In other words, the power of the legislature to regulate means the power to fix a maximum rate,²⁵—a limit which a telephone company cannot exceed either by dividing an excessive monthly charge into two or more separate items,²⁶ nor by establishing toll stations which charge for each conversation,²⁷ nor by claiming immunity as patentee of the Federal government.

There appear to be two exceptions to the power of the State to regulate charges. First, where the nature of the telephone service is interstate, a case for Federal control as far as it is a common carrier of news between States,²⁸ and this question will be of increasing importance with the use of long-distance telephones. Secondly, where the State by words of positive grant has transferred this right, it may be to a municipal corporation, or to the telephone company, as part of its charter rights.²⁹ So jealously does the law protect this use of the police function that it can only be bargained away by words of express grant, or their equivalent in law,³⁰ and where a charter leaves ambiguity on this point the construction always favors the State.³¹

The effect of telephone messages in evidence is still an unsettled question. There are as yet no decisions from Federal courts

²¹ Cooley Const. Lim. 572.

²² Hockett v. State, 105 Ind. 250, and Munn v. Ill., 94 U. S. 113.

²³ 94 U. S. 155. ²⁴ Cent. L. J., Vol. 28, 41 note; 94 U. S. 164.

²⁵ Cent. L. J., Vol. 28, 41 note.

²⁶ 113 Ind. 143. ²⁷ 118 Ind. 194.

²⁸ Cent. L. J., Vol. 28.

²⁹ 94 U. S. 155, and 94 U. S. 164.

³⁰ 116 U. S. 307, and 96 Mo. 623.

³¹ 116 U. S. 307, and 96 Mo. 623.

on the subject, and the decisions of State courts are not such as to carry great weight. The telephone has become so identified with modern business, and its nature and operation so notorious, that courts will probably take judicial notice of it as belonging to public contemporary history.³² This subject seems to naturally fall under three heads: first, the effect of an ordinary communication between parties who recognize each other's voices; secondly, the effect of an answer from a person in an establishment as evidence to bind the proprietor; and thirdly, the effect of a message transmitted or repeated by an operator. It would seem that the first case differs in no way from an oral conversation aside from the question of witnesses thereto.³³ Declarations of an interested party should be admissible against such party, whether made in person, or through an electrical mechanism whereby the parties "talk with each other, as if face to face." In *People v. Ward*, 3 N. Y. Crim. R., 483, 511, it was held competent to give in evidence a message where the voice was recognized.

Secondly, suppose one calls up a business establishment and receives an answer, but does not recognize the voice as belonging to one of the firm. Is the answer admissible in evidence to bind the principal? In *Wolfe v. Mo. Pac. Ry. Co.*, 97 Mo. 413, it was held that where one by subscribing to a telephone, invited communication through that channel, he was bound by such conversation, even though the voice was not recognized, the latter fact affecting the weight but not the admissibility of the testimony.³⁴ This opinion rests upon the principle of agency, and not being from a court of highest authority, does not settle the law on this point, although it seems very properly to favor the interests of business by giving effect in evidence to answers made in the usual manner from a usual place of business. And yet, a general rule of evidence binding a principal by all answers given by telephone from his office would seem too sweeping, so that, until the higher courts pass upon the matter, each case ought to be settled according to its peculiar circumstances.

The third case in this connection arises when an operator acts as an intermediary between parties, and the increasing use of the long-distance telephone, over which it is often impossible to communicate with an ordinary transmitter, makes it a question of no small importance. Here again the cases are few and of doubtful authority. Two cases³⁵ have held such communi-

³² 97 Mo. 473.

³³ 24 Weekly L. Bull. 245.

³⁴ See also 82 Tex. 201.

³⁵ *Sullivan v. Kuykendall*, 82 Ky. 483, and *Oskamp v. Gadsden*, 35 Neb. 7.

cations admissible on the ground that the operator was acting as the agent of both parties. There is some objection to considering that person the agent of the party called up, unless that party could hear the message repeated.³⁶ How the operator can be considered the agent of the party called up when he does not know that he is conversing through a third party, so as to bind him by statements incorrectly repeated, is difficult to understand. The law of evidence will not regard a party as bound by the statements of a third party, unless he has referred others to him for information as in case of interpreters. If he heard it repeated, and either party would generally be able to in long-distance messages, his acquiescence would amount to adoption. Evidence so transmitted should go to the jury and have much or little weight, according to the circumstances. There is an analogy here to the case of the telegraph company which is ordinarily considered the agent of the sender. The law of telephonic evidence will probably remain embryonic until further developments have revealed all the possibilities of long-distance telephones.

The validity of official acts by telephone is an even more speculative question than the admission of telephone messages in evidence. But there are the same reasons for a liberal interpretation of such acts, and one which will facilitate rather than hamper the transaction of official business. In *Banning v. Banning*, 80 Cal. 271, it was held competent for a notary to take an acknowledgment of a deed by telephone, and in the absence of fraud, duress, or mistake, it was held conclusive evidence of the facts stated therein. In *Murphy v. Jack*,³⁷ one of the departments of the Supreme Court of New York held that an attorney in the City of New York might make a good affidavit for an attachment based upon information and belief, the information having been derived from his client communicating with him through a long-distance telephone from Boston,—and this, although he did not recognize the voice of the client. This recent opinion, coming from the New York Supreme Court, will doubtless have much weight in future decisions on the subject.

It is imprudent to attempt to apply the law to new conditions until they are thoroughly understood, and, while these two cases are doubtless rightly found on their facts, the final determination of this and other questions will come when the telephone takes its place with the railroad and telegraph as a settled institution.

Herbert H. Kellogg.

³⁶ 24 Am. L. Reg. 442, note.

³⁷ 10 N. Y. Law Journal, No. 146.